

## Opinion No. 43-4304

May 28, 1943

**BY:** EDWARD P. CHASE, Attorney General

**TO:** Honorable Scott H. Mabry, Assistant District Attorney, Albuquerque, New Mexico

We are in receipt of your letter of May 22, 1943, in which you state that frequently, after a writ of garnishment has been issued in the justice court, either before or after judgment, an affidavit of disqualification is filed pursuant to Sections 38-311 to 38-316, inclusive, of the 1941 Compilation. You further state that it often takes several weeks for the parties to agree on an alternate justice or for the district judge to appoint such alternate justice.

In the light of these facts you request our opinion as to whether the filing of an affidavit of disqualification under these sections releases the garnishment, or whether the writ of garnishment binds the garnishee until it is released or ordered paid by the alternate justice.

Section 38-313 provides, in part, that the designated alternate shall proceed "to try such cause and **conduct any further proceedings therein.**" This is the same language that is used in Section 38-312.

It is also noted that Section 38-314 provides that the affidavit may be filed at any time after the service of process.

In the light of the language contained in Sections 38-312 and 38-313 it is apparent that the alternate justice merely carries on from where the original justice left off and does not have the power or authority to go back and take jurisdiction of the previous steps that may have been taken by the original justice.

As to the proceedings started by the filing of a complaint and the issuance of a writ of garnishment, no other process may be issued other than the writ of garnishment. In view of these sections it is apparent that the Legislature contemplated that a writ of garnishment would bind the garnishee until he is released or ordered to pay the amount involved. It does not appear to the writer that any other possible construction could be made, since there is no authority for the alternate justice to go back and commence the proceedings anew. Further, if the filing of an affidavit of disqualification had the effect of releasing the garnishee it would make the garnishment proceedings unavailable to a creditor, since in each case all the debtor would have to do to have the garnishment released would be to file affidavit of disqualification. The same would be true if a writ issued after judgment.

Also, the writer has carefully examined the cases decided under Section 19-508, which is the section providing for the disqualification of district judge, and which is very similar

to the section here in question. Nowhere has the court even indicated that steps taken by a district judge prior to his disqualification would become null after he has disqualified.

In view of the foregoing, it is my opinion that the garnishee who has been served with a writ of garnishment executed by the original justice of the peace is bound until released or until he is ordered to pay by an alternate justice of the peace designated after the filing of an affidavit of disqualification.

In conclusion, the writer wishes to state that he has not considered the question of when an affidavit of disqualification in a justice court has been timely filed or whether a garnishment proceeding after judgment is a matter like an exemption, within the terms of Sec. 38-314.

Trusting that the foregoing sufficiently answers your inquiry, I am

By ROBERT W. WARD,

Asst. Atty. General